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No. 02-862

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a DELAWARE CORPORATION,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TAELE OF AUTHORITIES	iv
REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	1
A. There Was a Government-Authorized Physical Occupation of Petitioner's Property	2
B. There Was a "Permanent" Government-Authorized Occupation of Petitioner's Timberland	4
1. The Government Misconstrues the Meaning of a "Permanent" Physical Occupation	4
2. The Ability to Make Some Commercial Use Is Irrelevant to Physical Takings Claims	7
C. The Government's Attempt to Blur the Line Between Physical and Regulatory Takings Demonstrates Why the Petition Should Be Granted	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Agins v. Tiburon, 447 U.S. 255 (1980) 8
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 7
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 3, 4, 5
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 4
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *passim*
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7
Malone v. Bowdoin, 369 U.S. 643 (1962) 4
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 8
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) 6
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 6
Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) 3
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002) 7, 8
United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) 6
United States v. Peewee Coal Co., 341 U.S. 114 (1951) 6, 7
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 3
United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed.2d 1206 (1946) 5
Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 3, 4

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Endangered Species Act of 1973, 16 U.S.C.A. § 1531, *et seq.* 2

OTHER

1 W. Blackstone, Commentaries 139..... 5

J. Lewis, *Law of Eminent Domain in the United States* 197 (1888) 5

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Brief for the United States in Opposition ("Response") erroneously attempts to characterize Petitioner's takings claim as a regulatory one, rather than a *per se* physical taking. This argument is based on two faulty premises.

First, the government contends there was no physical occupation of Petitioner's property for takings purposes because it has no control over northern spotted owls. Prior precedent does not focus upon control of the occupant, however, but instead upon government authorization of the occupation as the determining factor. Here, there can be no dispute that spotted owls were authorized to, and did in fact, occupy the subject timberland. Furthermore, federal agents

were authorized to enter Petitioner's property to search for spotted owls and facilitate their continued authorized occupation.

Second, the government asserts that a physical takings analysis does not apply because the authorized occupation of Petitioner's land was not "permanent." To the contrary, the owls were authorized to occupy Petitioner's property for as long as they wished to remain, and Petitioner was barred from excluding the owls until they decided to leave. The injunction entered by the district court banning logging to protect the timberland as a northern spotted owl habitat was a "permanent" one. This was a "permanent physical occupation" under this Court's decision in *Loretto* and its historical physical takings jurisprudence.

Because it fails to acknowledge that Petitioner asserts a viable physical takings claim, the government misplaces reliance upon regulatory takings cases. These decisions are inapposite because, unlike here, they involve land use restrictions in permitting processes where no government-authorized occupation is at issue. Lower courts need guidance on the applicable takings analysis where government imposes a wildlife servitude upon private land. The Petition should be granted.

A. There Was a Government-Authorized Physical Occupation of Petitioner's Property

The Response attempts to portray the injunction that banned logging on Petitioner's property as a temporary means of enforcing *land use* regulations prescribed by the Endangered Species Act of 1973, 16 U.S.C.A. 1531 *et seq.* ("ESA"), and the ESA's incidental take permit ("ITP") application process. (Response at 13.) According to the government, northern spotted owls are simply "natural resources" that migrated onto Petitioner's property, and the injunction resulted in no government-authorized occupation

because it has no control over such "wildlife." (Response at 13.) As result, the Response applies a regulatory takings analysis to Petitioner's claim. (*See* Response at 11-12, discussing the alleged applicability of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985), a regulatory takings case.)

First, whether owls are "natural resources" is irrelevant, since this Court has held that government-authorized occupation of private land by natural resources can constitute a taking. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181, 20 L.Ed. 557 (1871) ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.").

Second, the fact that spotted owls are "wild" and beyond government control is also irrelevant to Petitioner's physical takings claim. Government had no control over the movement of the boating public in *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979), and the State of New York had no control over the "migration" of the cable television company in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982). The test is not control of the occupant, but whether government requires the landowner to acquiesce to an occupation by a third-party, live or inanimate. *Yee v. Escondido*, 503 U.S. 519, 527, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992); *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 439. The Response ignores this crucial distinction.

The government contends that the intrusion upon Petitioner's land by federal agents was merely incidental to the land use restrictions imposed for purposes of processing Petitioner's ITP application. That argument would be relevant only in a regulatory taking context. Here, the federal

agents occupied Petitioner's land as part of, and for purposes of perpetuating, a wildlife servitude that was imposed on Petitioner's property by the injunction. Where government agents performing official duties take part in a physical occupation of private land there is a physical taking. *See Malone v. Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, 8 L.Ed.2d 168 (1962) (compensation could be sought in lower court for physical taking due to forest ranger's occupation of private land); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 & n. 18, 69 S. Ct. 1457, 93 L.Ed. 1628 (1949) (similar holding).

B. There Was a "Permanent" Government-Authorized Occupation of Petitioner's Timberland

1. The Government Misconstrues the Meaning of a "Permanent" Physical Occupation

The government argues that there was no "permanent physical occupation" of the subject timberland sufficient to constitute a taking because the injunction was eventually lifted and Petitioner was allowed to harvest its timber. (Response at 10-11.) Contrary to the government's suggestion, however, a "permanent physical occupation" is not defined in *Loretto* as one of infinite duration. The applicable test is whether there has been a government-authorized physical occupation for a public purpose, coupled with a deprivation of the landowner's right to exclude the occupant *for as long as the intruder wishes to remain*. *See Yee v. Escondido*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176.

As this Court explained in *Loretto*:

"Insofar as Teleprompter means to suggest that this is not a *permanent* physical invasion, we must differ. So long as the property remains residential and a CATV company *wishes to retain the installation*, the landlord must permit it." 458 U.S.

at 439 (emphasis added). Thus, the wires and boxes affixed to the building in *Loretto* constituted a "permanent" occupation regardless of whether they remained there for a day, a year, or infinitely. It is ancient law that "'[a]ny invasion of property'" is a taking "'either upon, above or below the surface, and whether *temporary* or permanent.'" *Id.* at 430 n. 7 (emphasis added) (citing 1 W. Blackstone, Commentaries 139 and quoting J. Lewis, *Law of Eminent Domain in the United States* 197 (1888)).

Loretto contains an in-depth analysis of prior precedent supporting Petitioner's interpretation of what constitutes a "permanent" physical occupation. For example, in *Kaiser Aetna* the imposition of a navigational servitude requiring public access to a pond was held to be a taking. *See Loretto*, 458 U.S. at 433. The taking was "permanent" regardless of how often the boating public chose to use the right of way through the private property. The key was not duration *per se*, but the imposition of a servitude for occupation by third parties as often as they liked, in derogation of the landowner's right to exclude, "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting *Kaiser Aetna*, 444 U.S. at 176).

Loretto also examines *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946), where it was held that frequent overflights of government planes at low altitudes can result in a permanent physical taking because they devalue private property and a landowner has no power to exclude them. *Loretto*, 458 U.S. at 430-431. The government may choose to cease such flights at any time, but the occupation is just as "permanent" for a physical takings analysis.

Further instructive is this Court's discussion in *Loretto*, contrasting prior decisions that have found physical takings with those that have not. *See* 458 U.S. at 430-434.

For example, in *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L.Ed. 809 (1951), the government's five-month seizure and direction of the operations of a private coal mine to prevent a national strike by miners constituted a physical taking. The limited duration of the physical occupation made no difference. In *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330, 43 S. Ct. 135, 67 L.Ed. 287 (1922), the government's intent to fire munitions over a private resort was held to be a physical taking if the plaintiff could prove the government was in fact engaging in such activity. The decision placed no importance on any showing that such military exercises would be infinite in duration. *Id.* at 330. *See Loretto*, 458 U.S. at 430-431 (discussing *Pewee* and *Portsmouth*).

By contrast, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 78 S. Ct. 1097, 2 L.Ed.2d 1228 (1958), no taking occurred where a government order required certain gold mines to cease operations to conserve resources for the war effort. A physical takings analysis did not apply there because the "'the Government *did not occupy, use, or in any manner take physical possession* of the gold mines or of the equipment connected with them.'" *Loretto*, 458 U.S. at 431-432 (emphasis added) (quoting *Central Eureka Mining Co.*, 357 U.S. at 165-166).

Loretto also distinguished *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980). In that case, this Court upheld a state constitutional requirement that shopping centers permit exercise of free speech rights on their property. 447 U.S. at 84. Relevant factors to this holding were: (1) that the general public is already invited to occupy the land, and (2) that the owner has sufficient *power to exclude* through reasonable time, place, and manner restrictions on expression that will minimize interference with commercial functions of the property. *Id.* *See Loretto*, 458 U.S. at 434 (discussing *PruneYard*).

Numerous other decisions of this Court also support the proposition that temporary, government-authorized physical occupations are compensable takings. As this Court recently explained in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478-79, 152 L.Ed.2d (2002):

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [*Pewee*], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government *occupies the property* for its own purposes, *even though that use is temporary.*

(Emphasis added.) *See also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987) (forced temporary occupation by floodwater).

2. The Ability to Make Some Commercial Use Is Irrelevant to Physical Takings Claims

The government argues that there was no permanent physical occupation here because Petitioner allegedly was permitted some use of its property. This contention has no merit. The ability to derive *some* commercial use or value is relevant only in the regulatory takings context, *see, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992). As this Court explained in *Loretto*:

> "It is true that the landlord could avoid the requirements of [the law allowing cable television equipment installation] by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."

458 U.S. at 439, n. 17. Here, Petitioner's right to harvest its timber was compromised by the district court's "permanent" injunction, which imposed a servitude to preserve the timberland for occupation by spotted owls.

C. The Government's Attempt to Blur the Line Between Physical and Regulatory Takings Demonstrates Why the Petition Should Be Granted

This Court stated a bright-line test for distinguishing between physical takings and regulatory takings in *Tahoe-Sierra*, 122 S. Ct. 1465. A regulatory taking does not give the government "any right to use the property" for its own purposes, *id.* at 1479 n. 19, a right which the government claimed in this case. Moreover, a regulatory taking does not involve the landowner's right to exclude unwanted occupants (*id.*), which right is also at the heart of this case.

The government attempts to shoehorn this case into the category of land use restrictions incidental to government permit processes, which involve no government-authorized physical occupation. (*See* Response at 11-12.) As demonstrated above, that characterization is simply incorrect. Consequently, the government's contention that Petitioner must prove facts consistent with a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978) and *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), is also incorrect.

The government's strategy, however, is relevant in and of itself. Regulatory takings are notoriously difficult to prove and very fact intensive. The existence of a physical taking, on the other hand, is much easier to establish. *See Loretto*, 458 U.S. at 426. Placing all wildlife servitude claims in a regulatory takings "box" puts the landowner at a disadvantage. As a matter of law, that approach is invalid.

Moreover, as a matter of public policy, where government chooses to forgo the acquisition of private land by eminent domain to protect wildlife, it should be required to pay compensation to landowners who may otherwise be inclined to harvest or develop their property as quickly as possible before a protected species invades and government actions to preserve the land untouched will render the property essentially valueless.[1]

CONCLUSION

Petitioner respectfully urges this Court to grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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February 18, 2003

[1] The Petition discusses the conflict in lower court decisions on this issue. The Response cites the fact that some of these cases involved takings claims under state constitutional law. That is for practical purposes a distinction of form over substance. The division of opinion on how to approach takings claims where a wildlife servitude is imposed remains an important one that this Court can and should resolve.